85-1510

No.

Supreme Court, U.S.
FILED
MAR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTY NEWSREEL SERVICES, INC.,
Petitioner,

v.

CITY OF ANN ARBOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL NULL
155 North Michigan Avenue
Suite 700
Chicago, Illinois 60601
(312) 565-2570
Counsel for Petitioner

March 10, 1986

Pandick Midwest, Inc., Chicago • 733-6000

23pp

The Petitioner, Christy Newsreel Services, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 11, 1985.

QUESTIONS PRESENTED

1. Whether a court can deny standing to the proposed operator of a constitutionally protected business challenging on constitutional grounds a law affecting the operation of such a business, on the basis that the operator presently lacks sufficient financial capacity to carry on the business.

2. Whether a court, in determining the assets available to a single shareholder corporation and the proposed operator of a constitutionally protected business, must consider the assets of both the sole shareholder and the corporation.

INDEX

	PAGE
Questions Presented	i
Opinions Below	iv
Jurisdiction	iv
Statutory Provisions Involved	iv
Statement of the Case	1
Reasons for Granting the Writ	3
1. Permitting a Court to Inquire Into the Financial Capacity of a Party Seeking to Exercise First Amendment Protected Rights, and Denying Such Party Standing to Challenge an Allegedly Unconstitutional Law if the Court Deems the Financial Capacity of Such Party Inadequate, is Improper and Potentially Abusive	3
2. The Judgment of the Court of Appeals For the Sixth Circuit Conflicts With Precedent Established by this Court	7
3. The Ruling Below that the Assets of a Sole Shareholder of a Corporation are Not to be Considered in Determining the Assets of the Corporation for Purposes of Deciding Standing Poses a Serious Threat to First Amendment Rights Generally, and Petitioner's Particularly	9
Conclusion	10
Appendix	1a

CITATIONS

Cases

	PAGE
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	7
Brockett v. Spokane Arcades, Inc., ____U.S. ____, 105 S. Ct. 2794 (1985)	7
Dombrowski v. Pfister, 380 U.S. 479 (1965)	7
First National Bank v. Bellotti, 435 U.S. 765 (1978)	3
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	7
Secretary of State of Maryland v. Joseph H. Munson Co., Inc., ____U.S.____, 104 S. Ct. 2839 (1984)	8
Village of Arlington Heights v. Metro Housing Development Corp, 429 U.S. 252 (1977)	8
Warth v. Seldin, 422 U.S. 490 (1975)	8

Ordinances

Ann Arbor City Code, Section 5.50	2

State Laws

Michigan Compiled Laws, Section 450.1261, Michigan Statutes Annotated, Section 21.200(261)	3

OPINIONS BELOW

The Court of Appeals for the Sixth Circuit issued no opinion, instead ruling from the bench pursuant to its Rule 19. The order of the Court of Appeals is reprinted in the Appendix hereto.

The District Court for the Eastern District of Michigan issued no opinion. Its order, which states the reasons for the court's judgment, is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 11, 1985. On February 10, 1986 Justice Sandra Day O'Conner, as Circuit Justice, granted Petitioner's Motion to Extend until March 11, 1986 the date for filing this Petition for Certiorari, and this Petition was filed by March 11, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

FIRST AMENDMENT

Congress shall make no law. . . abridging the freedom of speech . . .

FOURTEENTH AMENDMENT

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

CITY OF ANN ARBOR ORDINANCE

SECTION 5.50 *Regulations Concerning Adult Entertainment Businesses.*

(1) Definitions. The following words and phrases shall have the following definitions when used in this section.

(a) Adult entertainment business: A business whose principal service or activity is one of [sic] a combination of more than one of the following types of businesses; adult bookstore, adult motion picture theater, adult mini-motion picture theater, adult personal service business.

* * *

(c) Adult motion picture theater: An enclosed building with a capacity of fifty (50) or more persons used for presenting material characterized by their emphasis on portrayals of human genitals and pubic regions or acts of human masturbation, sexual intercourse, or sodomy for observation by patrons therein.

* * *

(2) Locations of Adult Entertainment Businesses. An adult entertainment business may be located in the City only in accordance with the following restrictions:

(a) No such business shall be located within seven hundred feet of a district which, pursuant to this Chapter, has been classified R1A, R1B, R1C, R2B, R3, R4A, R4B, R4C/D, R4D or R6.

(b) Such businesses shall only be located in a district classified pursuant to this Chapter as C2A.

(c) No such business shall be established within seven hundred (700) feet of another adult entertainment business.

* * *

MICHIGAN COMPILED LAWS, SECTION 450.1261, MICHIGAN STATUTES ANNOTATED, SECTION 21.200(261).

A corporation, subject to any limitation provided in this act, in any other statute of this state or in its articles of incorporation, shall have the power in furtherance of its corporate purposes to

* * *

(b) [s]ue and be sued in all courts and participate in actions and proceedings, judicial, administrative, arbitrative or otherwise, in like cases as natural persons.

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTY NEWSREEL SERVICES, INC.,
Petitioner,

v.

CITY OF ANN ARBOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF CASE

Petitioner, Christy Newsreel Services, Inc. (hereinafter "Christy Newsreel"), is a corporation duly organized under the laws of the State of Michigan. Karen Christy is the sole shareholder of Christy Newsreel. Christy Newsreel's articles of incorporation authorize the issuance of 50,000 shares of stock at $1 par value. Currently 1,000 shares have been issued to Karen Christy; as consideration Ms. Christy assigned to the corporation a leasehold interest Ms. Christy owned in a building located in Warren, Michigan valued at approximately $1,000.

For three years, beginning July, 1978, Ms. Christy was associated with and employed by Sun Services, a Michigan

business entity which owns and operates multiple adult bookstores and mini-motion picture theaters in Michigan. Ms. Christy's position at Sun Services was that of General Operations Manager, and as such Ms. Christy was the chief assistant to Sun Service's principal. Ms. Christy had substantial authority as Sun Service's number two person and gained valuable experience in the adult entertainment area.

Because of cash flow problems being experienced by Sun Services Ms. Christy was not paid in cash during her three years with the company. Instead she agreed that her salary of $300 per week would accrue, and that at the end of three years she could call upon that accrued debt to open her own business. Currently approximately $70,000 is owed Ms. Christy, and this amount is secured by an Article 9 financing statement on a herd of livestock owned by the principal of Sun Services.

In 1982 Ms. Christy felt ready to open her own adult business, and in that year Christy Newsreel was formed and incorporated for the purpose of establishing and operating an adult motion picture theater which would feature the exhibition of sexually oriented but non-obscene motion pictures. Christy Newsreel desired to operate such an adult motion picture theater in the city of Ann Arbor, Michigan, a municipal corporation and the Defendant and Respondent herein (hereinafter "Ann Arbor"). However, Section 5.50 of the Ann Arbor City Code severely restricts the location of adult motion picture theaters such as Petitioner seeks to operate.

Christy Newsreel located a site in Ann Arbor where it wished to locate an adult theater and which was available for lease. However, the location ran afoul of the locational restrictions contained in Section 5.50. Thus Christy Newsreel elected to institute a federal lawsuit against the City of Ann Arbor for declaratory and injunctive relief challenging the constitutionality of Section 5.50. Jurisdiction was founded upon 28 U.S.C. § 1343(c)(4) and 28 U.S.C. § 2201, and the action sought redress for rights secured by the First and Fourteenth Amendment and 42 U.S.C. § 1983.

The United States District Court for the Eastern District of Michigan entered Summary Judgment against Christy Newsreel, Petitioner herein, on the basis that Christy Newsreel was merely a paper corporation with but a single asset of uncertain value, the Warren leasehold. The court found that the $70,000 was owing to Karen Christy individually, and not Christy Newsreel and therefore should not be considered an asset of the corporation. The court held that because Christy Newsreel did not have the capacity to carry on the business of an adult motion picture theater no real controversy existed and therefore Christy Newsreel failed the Article III, § 2 case requirement and lacked standing.

The Court of Appeals for the Sixth Circuit, in a ruling delivered from the bench, affirmed the District court's holding. No written opinion was issued.

REASONS FOR GRANTING THE WRIT

1. PERMITTING A COURT TO INQUIRE INTO THE FINANCIAL CAPACITY OF A PARTY SEEKING TO EXERCISE FIRST AMENDMENT PROTECTED RIGHTS, AND DENYING SUCH PARTY STANDING TO CHALLENGE AN ALLEGEDLY UNCONSTITUTIONAL LAW IF THE COURT DEEMS THE FINANCIAL CAPACITY OF SUCH PARTY INADEQUATE, IS IMPROPER AND POTENTIALLY ABUSIVE.

Petitioner, Christy Newsreel, is a corporation duly organized under the laws of the State of Michigan. As a corporation, Christy Newsreel fully enjoys the First Amendment freedom of speech guarantee. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). Under Michigan law Christy Newsreel has the right to sue "in like cases as natural persons." M.C.L. § 450.1261, M.S.A. § 21.200(261) (set forth in the Statutory Provisions Involved section, supra). Thus, Christy Newsreel, in prosecuting its action against Ann Arbor, is properly subject to the same rules and treatment as would be accorded an individual pursuing the identical action.

No assertion has been made that Christy Newsreel is not a legally recognized corporation under Michigan law. It has filed articles of incorporation and otherwise complied with the requisite formalities for corporate existence. It is adequately capitalized to legally function as a Michigan corporation and enjoy the rights granted corporations, including the right to sue.

Christy Newsreel's status as a corporation duly authorized to transact business in the State of Michigan was not, in the judgment of the District Court and Court of Appeals, sufficient to confer it standing to challenge the Ann Arbor zoning ordinance. Instead the District Court, as affirmed by the Court of Appeals, additionally required a demonstration that Christy Newsreel had the financial capacity to carry on its intended business of an adult motion picture theater should it succeed in its action against Ann Arbor. Thus, the threshold inquiry is whether the courts below acted properly in requiring proof of adequate financial capacity as a prerequisite for Petitioner's standing to maintain its suit against Ann Arbor.

On principle the position that a party must demonstrate some minimum net worth, as determined by a court, before having standing to challenge a law which is alleged impermissibly infringes upon constitutionally protected rights, must be rejected. Clearly the poorest citizen of this country has the same right to free speech as the wealthiest. Similarly a corporation having the minimum amount of capitalization necessary under state law to lawfully function is equal in the eyes of the Constitution to a billion dollar corporation. The lower court rulings in this action effectively create an exception to this fundamental principle of constitutional law.

Christy Newsreel's capitalization should never have been considered. The logical result of the lower court rulings is that any party, whether corporate or individual, who seeks to exercise First Amendment rights by opening a business establishment, and institutes legal proceedings challenging a law restricting the operation of such a business, must, upon motion of the defendant, reveal the party's financial condition in order

to establish standing. The usual civil plaintiff suffers no similar burden. Thus a greater burden is placed upon those seeking to exercise their constitutional right to free speech than upon other civil plaintiffs, when precisely the opposite is mandated (*i.e.*, more protection should be accorded to those seeking to exercise First Amendment protected rights than to others).

The lower courts' focus on the assets, rather than the identity, of the plaintiff was misplaced and sets a dangerous example. Quite clearly the financial worth of a plaintiff should not be the determining factor in whether a party has standing. Presumably a wealthy California resident who has no real interest in establishing adult businesses could not scour the country challenging zoning laws merely because he has the financial capacity to operate such businesses. Instead attention should be directed at the identity of the plaintiff. In the present case, the plaintiff is a Michigan corporation whose sole shareholder is experienced in the operation of adult business establishments within the state. Additionally there is no proof that Petitioner can not or will not obtain additional financing in the future, when it comes time to actually open the theater. Clearly factors relating to the identity of the plaintiff, rather than mere financial considerations, should determine whether a case or controversy exists.

Allowing inquiry into the financial worth of the potential business leads to the next determination—whether the party's assets are sufficient to establish the business. To analyze this, the court must determine the costs of carrying on the business and make a finding as to whether the party's capitalization is adequate to cover such costs. Needless to say, determining the costs of a business not yet orperational is unavoidably imprecise. Guesswork would be the rule rather than the exception. A party's standing to constitutionally challenge a law cannot be contingent upon a judge's estimate of the costs of some future event; constitutional rights are not so fragile that the right to complain in court can wholly depend upon a necessarily uncertain finding as to a future event.

In considering the assets of a plaintiff such as Christy Newsreel, a court effectively prescribes a jurisdictional minimum different from that established by state law. State law may prescribe $1000 as the minimum capitalization for a corporation; upon satisfaction of such minimum (and other formalities) the corporation possesses, inter alia, the right to sue. However, a court, under the logic used by the lower courts herein, may find that a corporation seeking to open an adult theater needs $5000 in cash to carry on the business once opened, and a corporation not having $5000 cash in capital lacks standing. Effectively the court requires a higher jurisdictional minimum than state law. It is a legislative function to set jurisdictional limits, and the court improperly usurps its authority when requiring a greater capitalization than is required under state (or federal) law.

Whether a court can deny standing to a plaintiff seeking to express constitutionally guaranteed rights on the basis of the plaintiff's financial worth is an issue of potentially great consequence. As addressed above, this issue has ramifications beyond the present case of a minimally capitalized corporation seeking declaratory judgment prior to opening an adult motion picture theater Individuals as well as corporations are subject to the lower courts' rulings, as well as both minimally capitalized corporations and those more substantially capitalized. Conflict between state law and federal court power is also in issue. In addition, the requirement that a plaintiff demonstrate some threshold level of financial worth as a prerequisite for standing has application far beyond the adult business sphere. Thus, for example, an attorney of modest means may lack standing to challenge a municipal ordinance prohibiting the practice of law within its jurisdiction. An endless number of similar examples can be imagined. In short, the issue of whether a court can deny standing to a plaintiff asserting constitutional rights based on an ad hoc determination that the plaintiff lacks sufficient means is sufficiently important in itself, and in conjunction with its application to other areas, to warrant the issuance by this Court of a writ of certiorari.

2. THE JUDGMENT OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CONFLICTS WITH PRECEDENT ESTABLISHED BY THIS COURT.

As addressed below, this Court generally allows standing to a party who asserts the First Amendment rights of third parties. *See e.g. Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Denial of standing to Christy Newsreel violates the spirit of this time-honored rule, since standing should not be denied Christy Newsreel, a party present, willing, qualified and prepared to operate an adult business establishment, when standing is upheld in other cases on the basis of the interests of unknown third parties. Thus recently in *Brockett v. Spokane Arcades, Inc.*, ____U.S.____, 105 S. Ct. 2794 (1985) plaintiff challenged a state obscenity statute. While plaintiff's own speech or expressive conduct may validly be prohibited or sanctioned, the Court permitted plaintiff to challenge the law on its face because it also threatened others not before the court (*i.e.*, those who refrain rather than speak). In *Brockett*, while the plaintiff, standing alone, may not have been a proper party, it still had standing.

The present case bears some similarity to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). The University alloted 16 of its 100 spaces in the medical school to minority disadvantaged students. Bakke challenged the rejection of his application to the medical school. Although there was no proof that Bakke would have been accepted even if the 16 spots were not reserved for minority students, the Court said Bakke still had standing, since he also suffered injury from the University's refusal to even consider him for these 16 places. Similarly in the present case, Christy Newsreel is damaged by the Ann Arbor ordinance's absolute prohibition against locating in its desired location, even if there is no assurance that Petitioner will in fact operate there. That is, Christy Newsreel does not lack standing merely because there is a possibility that it will not in fact operate its adult motion picture theater as

currently envisioned, just as Bakke did not lack standing because he may not have been admitted even if he was considered for one of the 16 places reserved for minorities.

Village of Arlington Heights v. Metro Housing Development Corp. 429 U.S. 252 (1977) granted standing to both MHDC (a non-profit developer) and an individual plaintiff, a black who worked in Arlington Heights and desired to live there. Plaintiffs challenged the Village's refusal to rezone property to permit the development of low to moderate income housing which, it was anticipated, would be racially integrated. That there was no guarantee that the proposed project would be built—since MHDC still had to secure financing, qualify for federal subsidies, and carry through with construction—did not divest MHDC of standing. 429 U.S. at 261. As in the present case, plaintiffs had a particular project in mind, thus distinguishing the case from *Warth v. Seldin*, 422 U.S. 490 (1975). *Warth* was relied upon by the District Court in the present case, but *MHDC* appears more apposite. Note also that in *MHDC* the individual plaintiff was not required to demonstrate that he qualified for the proposed housing project.

This Court expanded the third party standing rule in *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, ____U.S.____, 104 S. Ct. 2839 (1984), permitting a professional fundraiser to challenge a state law aimed at charities. Plaintiff performed work for charity, was directly affected by the law, and would be expected to satisfactorily frame the issues. Thus, even though it was not a charity, and even though it did not claim First Amendment rights, plaintiff possessed standing.

In light of this Court's rulings on standing, the rulings by the District Court and the Court of Appeals in the present case denying Petitioner standing are contrary to accepted law and must be reversed. Petitioner is directly asserting its own First Amendment rights, and if standing is awarded plaintiffs in First Amendment cases who vicariously assert the rights of unknown third parties then standing should be given a plaintiff such as

Christy Newsreel which is directly affected by Ann Arbor's legislation and is asserting its own rights.

3. THE RULING BELOW THAT THE ASSETS OF A SOLE SHAREHOLDER OF A CORPORATION ARE NOT TO BE CONSIDERED IN DETERMINING THE ASSETS OF THE CORPORATION FOR PURPOSES OF DECIDING STANDING POSES A SERIOUS THREAT TO FIRST AMENDMENT RIGHTS GENERALLY, AND PETITIONER'S PARTICULARLY.

Karen Christy, the sole shareholder of Christy Newsreel, is currently owed approximately $70,000, and she can collect such debt upon demand. Ms. Christy testified under oath at her deposition that she would use the proceeds of such debt in the operation of the Ann Arbor adult motion picture theater. It would be a simple matter for Ms. Christy to collect the debt and invest all or part of it in Christy Newreel for the operation of the theater. Yet the District Court, as affirmed by the Court of Appeals, refused to consider Ms. Christy's personal assets in deciding the standing question. Such a myopic view has deprived Ms. Christy and Christy Newsreel of their First Amendment rights, and if applied in other cases could threaten the First Amendment rights of other closely held corporations and their shareholders who understandably refuse to tie-up large sums of money in a corporation which, as in the present case, may not yet be transacting business. While Petitioner does not believe that the Court need reach this point, if inquiry into the financial capacity of a proposed First Amendment business is permissible, then the assets of the sole shareholder of a corporation, as well as the assets of the corporation itself, should be considered.

CONCLUSION

For these reasons, a writ of certiorari should be issued to reverse the Judgment of the Sixth Circuit.

Respectfully submitted,

MICHAEL NULL
155 North Michigan Avenue
Suite 700
Chicago, Illinois 60601
Counsel for Petitioner

March 10, 1986

APPENDIX

TABLE OF CONTENTS

SUBJECT MATTER	PAGE
1. ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS	2a
2. ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN	3a

Filed Nov 11, 1985
John P. Hehman, Clerk

No. 83-1343

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

CHRISTY NEWSREEL SERVICES, INC.,
Plaintiff-Appellant

vs.

CITY OF ANN ARBOR,
Defendant-Appellee

ORDER

BEFORE: **ENGEL** and **MILBURN**, Circuit Judges; and **EDWARDS**, Senior Circuit Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be, and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ JOHN P. HEHMAN

UNITED STATES DISTRICT COURT

Eastern District of Michigan

Southern Division

CHRISTY NEWSREEL SERVICES, INC., *Plaintiff,*	Civil Action No. 82-60360
v.	HON. CHARLES W. JOINER
THE CITY OF ANN ARBOR, *Defendant.*	

ORDER

This case is before the court on defendant City of Ann Arbor's Motion for Summary Judgment. For the reason given below, the motion is granted.

Plaintiff Christy Newsreel Services, Inc. challenges the constitutionality of Ann Arbor's zoning ordinance, specifically as it applies to adult entertainment businesses. Plaintiff alleges the ordinance effectively denies it the opportunity to open an adult movie theater in Ann Arbor. The ordinance limits adult entertainment businesses to C-2A zones, of which there are two. Within a C-2A zone, an adult entertainment business may not be located within 700 feet of a residentially zoned district nor within 700 feet of another adult entertainment business. The complaint alleges that this leaves 14 actual sites where an adult movie theater could be opened and none of these are available even theoretically.

The problem is that plaintiff could not now open an adult movie theater in Ann Arbor even if the court were to declare the ordinance unconstitutional. Plaintiff was incorporated on November 1, 1982, the same day this suit was filed. Ms. Karen Christy was the sole incorporator. The articles of incorporation authorize the issuance of 50,000 shares at $1 par value.

However, only 1,000 shares have been issued and they were not purchased with cash. Rather, Ms. Christy assigned her lease on a building in Warren, Michigan to the corporation in exchange for the shares. Christy Newsreel Services, Inc.'s business address is the same as its attorney's address in Southfield, Michigan. All this is undisputed.

Ms. Christy testified in deposition that her boyfriend owes her approximately $70,000 which is secured by an Article 9 financing statement on a herd of 160 cows owned by him. The debt arose, according to Ms. Christy, because she worked for her boyfriend for several years with the understanding that she would be paid when she was ready to start her own business. Although this is slightly bizarre, the court assumes it is true. Even if it is, however, the debt is owed to Ms. Christy, not to the corporation. Nothing obligates her to put the money into the corporation.

Therefore, despite plaintiff's protestations that it has access to approximately $70,000 which it would use to open an adult movie theater in Ann Arbor, plaintiff is a paper corporation with but a single asset—an assigned lease of uncertain value. Under these circumstances, plaintiff has no standing to bring this suit, *Warth v. Seldin*, 422 U.S. 490 (1975), and the case is not ripe for decision. *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498 (1972).

The court does not hold that plaintiff must open an adult movie theater in violation of the Ann Arbor zoning ordinance before it is entitled to invoke federal court jurisdiction. That would obviate the purpose of the Declaratory Judgments Act, 28 U.S.C. § 2201. However, Article III, § 2's "case" requirement demands a more substantial controversy than exists here. At the very least, it requires plaintiff to have the capacity to carry on the business it claims to be engaged in. The constitution does not permit this court to solve hypothetical problems.

Therefore, the defendant's motion is granted and the case is dismissed. It is not necessary to rule on the City's res judicata and abstention argument.

So Ordered.

/s/ CHARLES W. JOINER
CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: March 15, 1983
Ann Arbor, Michigan

Supreme Court, U.S.
FILED
APR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1510

In The
Supreme Court of the United States
October Term, 1985

CHRISTY NEWSREEL SERVICES, INC.,

Petitioner,

v.

CITY OF ANN ARBOR,

Respondent.

BRIEF OF CITY OF ANN ARBOR IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE CITY ATTORNEY
By R. Bruce Laidlaw (P 16346)
City Attorney
P.O. Box 8647
Ann Arbor, Michigan 48107
(313) 994-2670
Attorneys for Respondent

Dated: April 18, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

SHOULD THE FEDERAL COURTS ENTERTAIN A CHALLENGE TO A ZONING ORDINANCE BY A CORPORATION WHICH CANNOT DEMONSTRATE THAT IT HAS THE CAPABILITY OF ENGAGING IN THE BUSINESS REGULATED BY THE ORDINANCE?

TABLE OF CONTENTS

	Page
Question Presented	i
Index to Authorities	iii
Statement of Case	1
Reason Why the Writ Should be Denied	2
This Case Does Note Present an Article III Actual Case or Controversy	2
Relief Requested	4

INDEX TO AUTHORITIES

Page

CASES

Baker v Carr, 369 US 186, 7 L Ed 2d 663, 82 S Ct 691 (1962) 4

Flast v Cohen, 392 US 83, 20 L Ed 2d 947, 88 S Ct 1942 (1968) 3

Los Angeles v Lions, 75 L Ed 2d 675 (1983) 4

Warth v Seldin, 22 US 490, 45 L Ed 2d 343, 358 S Ct 2197 3

OTHER

Supreme Court Rule 17.1 2

United States Constitution, Article III 2, 4

STATEMENT OF CASE

Prior to the commencement of the present suit, Sun Services, through various entities, had repeatedly challenged the constitutionality of the adult entertainment provisions of the Ann Arbor zoning ordinance. It had challenged the zoning ordinance's constitutionality in two civil suits in the Federal District Court, in a suit in the State Circuit Court, and in appeals from the decisions from those Courts. In addition, it had litigated the constitutionality in criminal proceedings in the State District Court.

Subsequently, the present suit was filed by the Plaintiff on the same day it was incorporated. Its sole incorporator was an employee of Sun Services and its sole asset was an assignment of a leasehold interest in property in another City. That leasehold interest was assigned an arbitrary value of $1,000. The complaint alleged that Plaintiff corporation had "the desire and willingness" to buy or lease space for an adult movie theater in Ann Arbor. However, it gave no indication of how, where or when it would do this.

When the standing question was raised, Plaintiff attempted to show its capacity to operate an adult entertainment business by virtue of money owed to its sole incorporator and stockholder. However, it offered nothing to show that even if these funds were accessible, that they were in any way legally committed to the corporation.

The District Court granted Respondent's motion for summary judgment and dismissed the action based on lack of standing. This was appealed to the 6th Circuit Court of Appeals. That Court gave its verbal opinion

affirming the District Court at the end of Petitioner's oral argument on the appeal. Still pending before that Court is Respondent's motion for an award of attorney's fees based on the frivolous nature of the appeal.

———o———

REASON WHY THE WRIT SHOULD BE DENIED

This Case Does Not Present an Article III Actual Case or Controversy.

Supreme Court Rule 17.1 requires that a writ of certiorari be granted only when there are special and important reasons for granting the writ. Rather than important, this claim is frivolous. It seeks to allow the raising of a constituional question by a corporation whose only business activity has been the filing of the lawsuit. If the Federal Courts were permitted to entertain such suits, a party who was unhappy with one judgment would need only to form a new corporation and try the claim in another form. However, the Constitution does not permit the Federal Courts to consider such matters.

The Constitution does not permit federal courts to solve hypothetical problems. Article III of the Constitution limits jurisdiction to actual cases and controversies. The concept of justiciability was analyzed in *Flast v Cohen*, 392 US 83, 20 L Ed 2d 947, 959, 88 S Ct 1942 (1968):

> "Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and

> when there is no standing to maintain the action." [footnotes omitted]

The facts presented to the District Court established that Christy Newsreel did not have legal standing to require an adjudication of the constitutional questions raised in its complaint. As a result, it was seeking an advisory opinion which it might use in connection with its business or someone else's.

Christy Newsreel alleged that it possessed "the desire and willingness" to buy or lease space for an adult movie theater in Ann Arbor (Complaint, paragraph 4, p. 2). Similar allegations were found insufficient by the Supreme Court in *Warth v Seldin*, 22 US 490, 45 L Ed 2d 343, 358 S Ct 2197. The Plaintiffs were attacking the constitutionality of allegedly exclusionary zoning and alleged a desire to reside in the community in question. In rejecting their claims for lack of standing, the Court stated:

> "We find the record devoid of the necessary allegations. As the Court of Appeals noted, none of these petitioners has a present interest in any Penfield property; none is himself subject to the ordinance's strictures; and none has ever been denied a variance or permit by the respondent officials."

Christy Newsreel had not secured a location for an adult movie theater, and it lacked the financial capacity to secure a location. Christy Newsreel responded that, through Karen Christy and, in turn, through her agreements with Sun Services, it could obtain sufficient funds to secure a location. However, there was no obligation on the part of Karen Christy or Sun Services to provide any funds to Christy Newsreel. It was, as Judge Joiner noted, sim-

ply a "paper corporation" with no financial capacity to carry on the business it alleged a desire to initiate. The complaint is void of any allegation of prosecution or threatened prosecution for violation of the City ordinance. This is understandable, because the City was unaware of the existence of Christy Newsreel until the service of the complaint. However, a demonstration of such injury or threatened injury is essential to establish standing under Article III.

> "Plaintiffs must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions. *Baker v Carr*, 369 US 186, 204, 7 L Ed 2d 663, 82 S Ct 691 (1962). Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *Los Angeles v Lions*, 75 L Ed 2d 675, 684 (1983).

—o—

RELIEF REQUESTED

Respondent City of Ann Arbor respectfully requests that the Court deny Petitioner's writ for certiorari.

OFFICE OF THE CITY ATTORNEY

By R. Bruce Laidlaw (P 16346)
City Attorney

P.O. Box 8647
Ann Arbor, Michigan 48107
(313) 994-2670

Attorneys for Respondent

Dated: April 18, 1986